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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 758

FRANK SGAMBATI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 11–12) is reported at 75 F. Supp. 18. The opinion of the United States Court of Appeals for the Second Circuit (R. 25–26) is reported at 172 F. 2d 297.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1949 (R. 26–27). The petition for a writ of certiorari was filed on May 2, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether infancy tolls the two-year period of limitations applicable to suits brought under the Public Vessels and Suits in Admiralty Acts.

STATUTES INVOLVED

Section 2 of the Public Vessels Act (43 Stat. 1112, 46 U. S. C. § 782) provides in pertinent part as follows:

> * * * Such suits shall be subject to and proceed in accordance with the provisions of [the Suits in Admiralty Act] or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

Section 5 of the Suits in Admiralty Act (41 Stat. 526, 47 Stat. 420, 46 U. S. C. § 745) provides in pertinent part as follows:

> * * * suits as herein authorized may be brought only on causes of action arising since April 6, 1917: *Provided,* That suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect: and all other suits hereunder shall be brought within two years after the cause of action arises * * *.

STATEMENT

The Public Vessels and Suits in Admiralty Acts confer jurisdiction only when suit is brought

within two years after the cause of action arises. 46 U. S. C. 745, 782, quoted *supra*. On December 27, 1942, petitioner, who was employed by Bethlehem Steel Company as a rigger, was injured while working aboard the U. S. S. *Bainbridge* (then designated the S. S. B–29). Petitioner was born on February 19, 1925 (R. 11), and was just short of eighteen years of age at the time the injury occurred. This libel was filed on February 13, 1947, more than four years after the cause of action arose and almost a year after petitioner reached his majority. Respondent's motion to dismiss the libel as barred by limitation was granted by the district court (R. 19). On appeal, the court below affirmed (R. 26).

ARGUMENT

The Court of Appeals, following its prior decision in *Osbourne* v. *United States*, 164 F. 2d 767, correctly stated the rule applicable to a period of limitation prescribed in a statute which creates a cause of action unknown at common law. In the absence of an express saving clause, "the period of limitation under any of these Acts will not be extended, as it would be in the case of an ordinary statute of limitations, by a claimant's disability to sue because of infancy or insanity or by a delay occasioned by the fraud of the defendant" (R. 26). And see *Anthony* v. *St. Louis, I. M. & S. Ry. Co.*, 108 Ark. 219; *Miller* v. *Industrial Commission*, 106 Colo. 364; *Elliott* v. *Brazil Block Coal Co.*, 25

Ind. App. 592; *Bohrer* v. *State Highway Comm.*, 137 Kan. 925; *Foster* v. *Railroad Co.*, 72 Miss. 886; *Ray* v. *Sanitary Garbage Co.*, 134 Neb. 178; *Gillette* v. *D., L. & W. R. R. Co.*, 91 N. J. Law 220; *Link* v. *Carolina & N. W. Ry. Co.*, 198 N. C. 78.

We submit that there is no reason here to depart from that rule. Petitioner could have sued by a next friend within the two-year limitation period. *New York Central & H. R. R. Co.* v. *Tonsellito*, 244 U. S. 360. Moreover, admiralty courts, unlike common law courts, do not regard a minor as necessarily incapable of bringing suit in his own name. *The David Faust*, Fed. Cas. No. 3595 (S. D. N. Y.); *The Melissa*, Fed. Cas. No. 9400 (E. D. Mich.); *Kelly* v. *The Topsy*, 44 Fed. 631 (D. S. C.); see Dunlap, *Admiralty Practice* (2d ed. 1850), pp. 97–98; II Parsons, *Shipping and Admiralty* (1869 ed.), p. 371; Cohen, *Admiralty Law* (1883), p. 163. Petitioner has made no attempt to show that, for any reason, it was impossible for him to file his claim within the statutory period. Cf. *Osbourne* v. *United States*, *supra*.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

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JUNE 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949